

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Applications of Tribune Media Company)	MB Docket No. 17-179
and Sinclair Broadcast Group)	
for Consent to Transfer Control of)	
Licenses and Authorizations)	

**RESPONSE OF 21ST CENTURY FOX, INC. AND
FOX TELEVISION STATIONS, LLC
TO PETITIONS TO DENY**

July 5, 2018

INTRODUCTION

21st Century Fox, Inc. and Fox Television Stations, LLC (collectively, “Fox”) respectfully submit this response to petitions filed by Free Press and American Cable Association (“ACA”) (collectively, “Petitioners”) to deny the assignment of licenses from Tribune Media Company (“Tribune”) to Sinclair Broadcast Group, Inc. (“Sinclair”), and certain divestiture applications—the only petitions that challenge the proposed transfer of ownership to Fox of some of the broadcasting stations Sinclair seeks to acquire from Tribune. As explained below, none of the arguments that Free Press and ACA marshal against the proposed transfer to Fox has merit.

Petitioners’ challenge to Fox’s proposed acquisition is premised on the assertion that the transfer would purportedly vest Fox with a national television audience reach in excess of the permissible limit. As both Free Press and ACA concede, however, their counting ignores the way that the national cap is calculated under applicable law, which requires the use of the UHF discount—a rule that the Commission expressly re-affirmed only last year and is actively defending in litigation. Once the UHF discount is taken into account, Fox’s post-deal national audience reach is in full compliance with the national audience reach cap—a fact that neither Free Press nor ACA contests. Petitioners’ arguments are fundamentally a challenge to the UHF discount rule itself. That challenge, however, is properly addressed in the Commission’s ongoing rulemaking process that is examining both the national television audience reach cap and the UHF discount rule—not here.

Similarly unavailing is ACA’s argument that Fox’s ownership of regional sports networks (“RSNs”) in three cities would increase Fox’s leverage in bargaining for retransmission consent. As Fox previously has explained, it does not force carriage of broadcast stations with

any other co-owned programming, and ACA provides no reason to suspect otherwise here. In any event, Fox is in the process of selling these RSNs, which would moot ACA's argument.

ARGUMENT

Free Press and ACA are the only two petitioners that challenged the proposed transfer of the ownership of seven television stations from Tribune (through Sinclair) to Fox. The central premise of Petitioners' opposition to the transfer is that it would purportedly result in Fox exceeding the national television audience limit of Section 73.3555(e).¹ Thus, Petitioners contend that, once the transfer is accomplished, television stations owned by Fox would reach 46.3 percent of households, whereas the national audience reach cap is 39 percent.² The problem with Petitioners' argument is that it ignores the way the national audience reach limit is calculated under applicable law. As both Free Press and ACA concede, their calculation does not take into account the UHF discount that the Commission's rules require when calculating a broadcaster's compliance with the national audience reach cap. The Commission's rules mandate that, "[f]or purposes of ... calculat[ing the national audience reach cap], UHF television stations shall be attributed with 50 percent of the television households in their DMA market."³ As Free Press concedes, with the UHF discount applied, Fox's post-transaction national audience reach would be slightly above 30 percent—and therefore well *below* the 39-percent national reach cap.⁴ In other words, by Petitioners' own admissions, Fox would be in full compliance

¹ See, e.g., Free Press's Petition to Deny ("Free Press Petition") at 12-16; ACA's Petition to Deny ("ACA Petition") at 5.

² See Free Press Petition at 12-13, 16; ACA's Petition at 5.

³ 47 C.F.R. § 73.3555(e)(2)(i); see also *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, MB Docket No. 13-236, Order on Reconsideration, 32 FCC Rcd 3390 ¶ 2 (2017) (hereinafter, "Order on Reconsideration") ("[i]n determining compliance with the 39 percent national audience reach cap, ... UHF stations have been attributed with only 50 percent of the households in their DMAs [Designated Market Areas], in recognition of technical limitations that restricted the audience reach of analog UHF stations)."

⁴ See Free Press Petition at 12-13 ("Fox's post-deal reach would be ... 30.6 percent with the UHF discount"); *id.* at 16 n. 57 ("With the ... UHF discount applied, ... Fox would reach 30.1 percent [of households]."). The

with the national television audience reach cap, as that cap is calculated under the applicable rules, which *requires* use of the UHF discount.

That should be the end of the matter. Because the proposed transfer of television stations to Fox is in compliance with the national audience reach cap (properly calculated), there is no basis for the Commission to do anything but approve that transaction. Petitioners may prefer a different way of calculating the national audience reach cap, but the Commission applies the rules as they currently exist, not the rule changes Petitioners would like to see in the future or the rules they are trying to achieve through litigation.

Petitioners' arguments are simply a thinly disguised attack on the UHF discount rule itself. To that end, Free Press contends that the Commission's April 2017 decision to reinstate the UHF discount was "arbitrar[y] and capricious[]" because (in Free Press' view) the UHF discount rule is technologically outdated.⁵ But—whatever the merit of those arguments—this is not the proper forum to consider them, especially given that the Commission has initiated a separate rulemaking process that addresses the UHF discount in the context of the national television audience reach cap.⁶ Unless and until the Commission eliminates or revises the UHF discount, it must apply current law to pending transactions. Indeed, it would be arbitrary and capricious for the Commission to *refuse* to apply the UHF discount in any specific transaction adjudicated prior to any change in the rule. *See Fort Stewart Schs. v. Fed. Labor Relations Auth.*, 495 U.S. 641, 654 (1990) ("[i]t is a familiar rule of administrative law that an agency must abide by its own regulations"). The proper forum to consider Free Press' policy arguments as to

percentages referenced in the preceding parentheticals are quoted as they appear in the Free Press Petition. ACA similarly acknowledges that it is "not counting the UHF discount" when calculating Fox's post-transaction reach as being 46 percent of households, implicitly conceding that Fox is in compliance with the cap once the UHF discount is applied. *See* ACA Petition at 5.

⁵ Free Press Petition at 6, 14-16.

⁶ *See Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, MB Docket No. 17-318, Notice of Proposed Rulemaking, FCC 17-169 (Dec. 18, 2017).

whether the Commission should reevaluate the UHF discount is the ongoing rulemaking process where (as Free Press acknowledges) it already has submitted comments.⁷

Free Press says that it “expects” to obtain a judicial reversal of the Commission’s decision to reinstate the UHF discount.⁸ But the fact that Free Press has challenged the Commission’s reinstatement of the UHF discount in court is not a sufficient reason to set that rule aside in the meantime.⁹ Free Press’ argument that the Commission should refuse to apply its own rule absent any judicial stay of that rule—which Free Press sought and which the U.S. Court of Appeals for the District of Columbia Circuit denied—is baseless.¹⁰

ACA’s arguments are cut from the same cloth, and fare no better. ACA argues that, as a result of the pending applications, Fox’s “increased national reach” would give it “leverage to raise retransmission consent prices.”¹¹ This argument rests on the same faulty premise—that Fox’s resulting station ownership would amount to 46 percent, exceeding the national audience cap. ACA’s math, however, ignores the Commission’s rules for calculating the cap. Pursuant to the UHF discount, Fox’s post-transaction ownership would be well below the 39 percent cap.¹² ACA’s argument that this level of ownership—which fully complies with the regulatory requirements—can somehow vest Fox with unfair leverage flies in the face of the Commission’s

⁷ See Free Press Petition at 15 & n.51.

⁸ See Free Press Petition at 15.

⁹ Even if a court at some time in the future rules that the Commission did not act legally in reinstating the UHF discount, neither Free Press nor anyone else can predict how the Commission would react to such a decision. While the Commission may be bound to eliminate the discount going forward in the immediate aftermath of the ruling, it also may choose to revise the level of the national audience reach cap (or eliminate it altogether), depending on the courts’ conclusions as to the Commission’s authority. And the Commission may remain free to reinstate the UHF discount if it engages in additional rulemaking. This fact proves the folly of Free Press’ suggestion that the Commission should review the pending applications on the basis of anything other than current law.

¹⁰ Free Press’ cursory argument that the proposed station transfer would negatively impact “competition, diversity, and localism,” Free Press Petition at 13, is a variation on the same theme, and similarly lacks merit. The national audience reach cap was designed “to protect localism, diversity, and competition.” Order on Reconsideration at ¶ 4. As long as a broadcaster’s station ownership complies with the cap, the size of its ownership cap figure cannot result in harm to localism, diversity, or competition—even assuming, for the sake of argument, that the cap remains necessary to protect those attributes in the first place.

¹¹ ACA Petition at 5.

¹² See *supra* at 2.

(and Congress’) determination that no threat to competition exists if a single broadcaster’s ownership complies with the audience limitation.

ACA attempts to resuscitate its argument by pointing (with little elaboration) to Fox’s ownership of RSNs in three cities: Miami, Cleveland, and San Diego.¹³ ACA does not explain, however, how ownership of a specific type of non-broadcast programming network (such as sports) would give a broadcaster any added “leverage” with respect to bargaining for retransmission consent. Indeed, Fox repeatedly has explained to the Commission that it does not force carriage of broadcast stations with any other co-owned programming: “[A]llegations that broadcasters can compel carriage of their affiliated non-broadcast [programming] networks defy empirical marketplace realities.” Letter from Mace Rosenstein, Counsel to 21st Century Fox, Inc., CBS Corporation, The Walt Disney Company, and Univision Communications Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 15-216, 16-41, at 1-2 (June 20, 2016) (presenting data “demonstrating the absence of a meaningful correlation between retransmission of a local Fox-owned television station or carriage of a Fox regional sports network, on the one hand, and carriage of other Fox networks, on the other”).

In any event, Fox has announced that it has entered into a transaction to sell these RSNs. As ACA is aware,¹⁴ Fox is in the process of selling certain assets (which include the RSNs) to The Walt Disney Company (“Disney”).¹⁵ And just a few days ago, on June 27, 2018, the U.S. Department of Justice announced a settlement to approve the transaction on the condition (accepted by Disney) that Disney sell the 22 RSNs that are currently owned by Fox to a buyer

¹³ ACA Petition at 5.

¹⁴ See ACA Petition at 5 n.13.

¹⁵ The transaction is subject to a shareholder vote (currently scheduled for July 27, 2018) as well as completion of regulatory reviews and customary closing conditions.

acceptable to the Department.¹⁶ Since Fox is in the process of selling these RSNs, ACA's argument is simply beside the point.

CONCLUSION

Fox's proposed acquisition of seven television stations in this proceeding complies with the national television audience reach cap as currently in effect, when calculated in accordance with the Commission's UHF discount rule. Petitioners do not challenge that fact, but instead attack the UHF discount rule itself. This transaction is not a proper forum to consider their challenge (which is the subject of an ongoing Commission rulemaking and pending litigation), and settled administrative law principles require the Commission to apply the UHF discount in any adjudication decided while the rule remains in effect. Accordingly, the Commission should dismiss the petitions to deny insofar as they relate to Fox.

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Respectfully submitted,

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¹⁶ See U.S. Dep't of Justice, "The Walt Disney Company Required to Divest Twenty-Two Regional Sports Networks in Order to Complete Acquisition of Certain Assets From Twenty-First Century Fox," <https://www.justice.gov/opa/pr/walt-disney-company-required-divest-twenty-two-regional-sports-networks-order-complete> (June 27, 2018).

CERTIFICATE OF SERVICE

I, hereby certify that on the 5th day of July 2018, I electronically filed the foregoing Response of 21st Century Fox, Inc. and Fox Television Stations, LLC to Petitions To Deny with the Commission using the ECFS system and caused a copy of the foregoing to be served upon the following by electronic mail and first-class mail:

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